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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

1. Whether evidence discovered pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued to conduct a security check.

2. Whether certain statements in a search warrant affidavit were intentional material misrepresentations that render the warrant invalid.

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No. 82-5298

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v.

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OPINIONS BELOW

The opinion of the court of appeals on the interlocutory appeal (Pet. App. B) is reported at 663 F.2d 411. The opinion of the court of appeals affirming the convictions (Pet. App. C) is unreported. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982. The petition for a writ of certiorari was filed on August 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the district court's grant of petitioners' suppression motion, the United States took an appeal pursuant to 18 U.S.C. 3731. The court of appeals affirmed in part and reversed in part (Pet. App. B). Petitioners were then tried before a jury in the United States District Court for the Eastern District of New York and were convicted of distributing,

possessing with intent to distribute, and conspiring to distribute cocaine in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Segura was sentenced to ten years' imprisonment on the conspiracy conviction and to ten years' imprisonment followed by a 15-year special parole term on each of the three substantive counts of which he was convicted, all sentences to run concurrently. Petitioner Colon was sentenced to eight years' imprisonment on the conspiracy conviction and to eight years' imprisonment and a special parole term of 15 years on each of the three substantive counts of which she was convicted, all sentences to run concurrently. The court of appeals affirmed (Pet. App. C).

1. The pertinent facts are set out in the first opinion of the court of appeals (Pet. App. B, 5308-5311) and in the opinion of the district court (Pet. App. A, 2-6, 12-15). Government agents had been keeping petitioners under close surveillance because they were suspected of engaging in cocaine sales. On February 12, 1981, agents observed petitioners transfer a bulky item to Enrique Rivudalla-Vidal and Esther Parra. Shortly thereafter, Rivudalla was arrested in possession of a bag that contained approximately one-half kilogram of cocaine. Rivudalla told the agents that he had received the cocaine from petitioner Segura, that they had originally planned a larger sale and that Segura was to call him later that evening (Pet. App. B, 5309).

At about 6:30 p.m., the agents obtained authorization from an Assistant United States Attorney to arrest petitioners but were advised that a search warrant could not be obtained until the following day. The agents then undertook surveillance of petitioners' apartment building and arrested Segura when he entered the building at about 11:15 p.m. Although Segura denied living in the building, agents took him to his apartment, knocked on the door, and entered the apartment when petitioner Colon opened the door. In addition to Colon, they discovered three

other persons in the apartment. The agents performed a limited security check of the premises before arresting Colon and taking all five individuals to Drug Enforcement Administration (DEA) headquarters. In the course of the security check, the agents discovered a triple beam scale, several jars of lactose and numerous small cellophane bags; these items were left in the apartment, which was secured by two agents who remained on the premises until the search warrant was obtained. When petitioner Colon attempted to bring a shoulder bag with her to DEA headquarters, the bag was searched and a loaded revolver and over $2000 in cash were found (Pet. App. B, 5309-5310).

A search warrant application was presented to a magistrate the next day, and a warrant was issued and executed. Agents discovered 1250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat, 18 rounds of ammunition for the revolver, over $50,000 in cash, and records of narcotics transactions. The items discovered during the search pursuant to the warrant were seized, together with the other evidence that had been discovered in the course of the security check the previous day.

2. Following a hearing, the district court granted petitioners' motion to suppress all the evidence seized from the apartment (Pet. App. A). The court found that there were no exigent circumstances to justify the warrantless entry into the apartment and hence that the original entry and security check of petitioners' apartment was illegal (Pet. App. A, 18). The court concluded that the search warrant itself was valid (id. at 18-19), but, relying heavily on United States v. Griffin, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), held that the evidence seized pursuant to the warrant nonetheless had to be suppressed (Pet. App. A, 19-22). The court explained that the evidence would not inevitably have been discovered in the absence

of the illegal entry because petitioner Colon might have destroyed it before the warrant could be executed (id. at 22).

The court of appeals affirmed in part and reversed in part (Pet. App. B). The court agreed that the warrantless entry was illegal (id. at 5311-5315), but it held that the evidence seized pursuant to the valid warrant was admissible (id. at 5315-5317). The court explained that the fact that persons were present in the apartment who might otherwise destroy the evidence was a "prudentially unsound" basis for suppression because it would penalize the officers for the correctness of their belief that an entry was necessary to prevent destruction of the evidence (id. at 5317). The court further held, however, that the evidence actually discovered in the course of the initial entry must be suppressed (id. at 5317-5318).

Petitioners were then tried and convicted, and the court of appeals affirmed their convictions (Pet. App. C). The court rejected their contention that the search warrant was invalid because of material misrepresentations in the affidavit, holding that this contention was foreclosed by the court's earlier decision on the government's pretrial appeal and that, in any event, the district court had correctly concluded that there were no material misstatements in the affidavit that would invalidate the warrant (id. at 1-2). The court also rejected the contention that the evidence was insufficient (id. at 2-3).

ARGUMENT

1. Petitioners contend (Pet. 9-14) that the court of appeals erred in suppressing the evidence discovered pursuant to a valid warrant after agents had illegally entered the apartment without a warrant. They correctly note that the decision below conflicts with United States v. Allard, 634 F.2d 1182 (9th Cir.

1980). There is presently pending before this Court a petition for a writ of certiorari in United States v. Crozier, No. 82-819. 1/ That petition raises several issues, including the same question presented here concerning the admissibility of evidence discovered while executing a valid warrant on premises that had earlier been entered illegally. In our petition in Crozier (at 19-20), we note the conflict between the instant case and Allard, on which the Crozier court relied, and urge the Court to grant certiorari to resolve that conflict. 2/

For the reasons set forth in our petition in Crozier (at 16-19), petitioners' contention that the decision below was erroneous is without merit. The illegal entry did not cause the later discovery of the evidence pursuant to the warrant; hence, that evidence was not a "fruit," but rather was derived from a source independent of any illegality and should not have been suppressed. See, e.g., Wong Sun v. United States, 371 U.S. 471, 481 (1963). As the court of appeals explained (Pet. App. B, 5317), the fact that there were persons present in the apartment does not alter that conclusion. The Fourth Amendment does not protect an individual's right to destroy incriminating evidence during the time it takes to procure a warrant. Thus, the court of appeals correctly ruled that the evidence discovered pursuant to the warrant was admissible. Accord, United States v. Beck, 662 F.2d 527, 530 (8th Cir. 1981); United States v. Kinney, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981). United States v. Fitzharris, 633 F.2d 416, 421 (1980), cert.

1/ A copy of our petition in Crozier is being supplied to petitioners.

2/ Petitioners err in asserting that the decision below conflicts with United States v. Griffin. In Griffin, the court refused to apply the "inevitable discovery" doctrine to validate the seizure of evidence actually discovered in the course of the illegal entry. Here, the court of appeals agreed that evidence discovered during the illegal entry should be suppressed (Pet. App. B, 5317-5318).

denied, 451 U.S. 988 (1981). Nonetheless, in light of the need to resolve the conflict in the circuits on this issue, it is appropriate that this petition be granted or, alternatively, held pending the disposition of Crozier. 3/

2. Petitioners also contend (Pet. 14-19) that the warrant itself was not valid because the supporting affidavit contained "material misrepresentations" without which it failed to establish probable cause. This contention is insubstantial and does not warrant review by this Court.

Petitioners' allegations plainly do not justify invalidation of the warrant under Franks v. Delaware, 438 U.S. 154 (1978). As the court of appeals found (Pet. App. C, 2), there is no evidence to suggest that the alleged misstatements were "deliberate or reckless falsehoods." Rather, they were paraphrases by the affiant of statements that in fact were made to him. Rivudalla had told the agent that he believed that petitioner Segura still had the unsold cocaine on him (see Tr. 342-343; Pet. 15). And, as the court of appeals found (Pet. App. C, 2), the agent's interpretation of Segura's use of the phrase "the stuff" to refer to narcotics was a reasonable inference and surely not an intentional misstatement. Thus, the validity of the warrant was correctly upheld by both courts below, and this fact-bound contention does not warrant review by this Court. 4/

3/ Because Crozier presents a second, important issue that we believe also warrants this Court's consideration, the Court may find it preferable to resolve this issue in that case. In addition, because the court of appeals' conclusion that there were no exigent circumstances that justified the warrantless entry here is open to serious question, it is possible that the Court will not find occasion to resolve the conflict if it grants review in this case.

4/ Moreover, as the court of appeals explained (Pet. App. C,2), it was not proper to raise this issue for the first time on the post-trial appeal and the claim was therefore not adequately preserved. In contrast to the situation in United States v. West, 453 F.2d 1351 (3rd Cir. 1972) (see Pet. 19), petitioners are seeking the suppression of the very evidence held admissible on the pretrial appeal, and their challenge is to the validity of the warrant, which was the fundamental premise of the government's argument and the court's decision there. Any (Continued)

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of United States v. Crozier, supra, and disposed of as appropriate in light of the Court's disposition of that case. Alternatively, the petition should be granted, limited to Question 1.

Respectfully submitted.

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objection petitioners had to the validity of the warrant should have been put before the court of appeals at that time.